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Hair on the floor: Sign of a good arbitration

If you walk out of an arbitration with all your hair, maybe you're doing it wrong.

Geri Satin was a big firm lawyer in Florida who went back to school for her Ph.D. in legal psychology. Now, her firm, Focus Litigation Consulting, helps lawyers prepare for trial.

She also prepares lawyers for arbitration. I was one of several arbitrators from around the country chosen to serve on one of her mock arbitrations. It was a complex construction case and lots of fun. Geri loves the brainstorming process, and so do I.

Her firm works all around the country doing the usual pretrial jury research: Profiling, theming, case strategies, internet-assisted voir dire, witness prep and shadow juries.

But arbitrations? A lot of times lawyers don't think of this sort of preparation for an arbitration or bench trial, even though, as she recently told me, "Social science research shows that decision-makers come into cases with the same biases and attitudinal predispositions and thought processes, regardless of whether they're well-versed in the law or not."

She suggests it's even more important to do in an arbitration because of the very limited appellate rights. If you get it wrong the first time, you're probably done.

Pretesting the case with mock arbitrators lets you streamline preparation and theming to figure out what claims, evidence and exhibits work and what doesn't.

We mock arbitrators showed up at a marketing firm in Chicago at 8:30 for coffee and doughnuts. We each read a two-page synopsis of the case. Before anything else, we answered the first of six written questionnaires

with our initial impressions of the case. Then came an hour-and-a-half "clopening" — a combination opening and closing.

The first lawyer presenting had to teach us the technical terms and issues and make his case. We filled in the second questionnaire.

More coffee. More doughnuts.

Then the opposing side presented. Presentations used charts, process sequences, photographs and witness video clips. That's another good reason to videotape depositions.

Then came the next questionnaire on just that presentation, lunch and a lengthy questionnaire on our view of the whole case up to that point.

Arbitrators were split into two groups. Then it really got fun.

I was in a room with other experienced arbitrators behind a two-way mirror. On the other side, the lawyers and clients were watching and videotaping us. We had 10 questions to answer, very much like real jurors. Except we had to deliberate in an orderly fashion so a court reporter could transcribe our discussions.

It made us better listeners. None of us had spoken about the case until then. How amazing was it to hear my fellow "jurors" thoughts?

Points I never considered. Points I thought critical or trivial. We stated our cases. We tried to convince each other. We voted on each point and filled in our positional verdicts. Then another lengthy questionnaire.

For this interview after the program, I asked Geri what it was like watching us from behind the mirror.

"I can tell you that it's really enjoyable to watch mock arbitrators relative to mock jurors, because we can sit back and take

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Hon. Michael R. Panter (Ret.) is a senior mediator at ADR Systems of America LLC. He previously served in the Law, Family and Municipal Divisions of the Cook County Circuit Court. He was a trial lawyer for 30 years. Share responses and comments at mikepanter.com.

notes. Sometimes with mock jurors you have to go into the room and sort of re-steer a bit because you have limited time and want to get to the meat of the discussions."

Geri explained they're looking for the "why." Why panelists came out as they did. Why some arguments worked and some didn't.

They're also looking for sound bites, good theming, good metaphors and analogies, demonstratives that didn't work, feedback on witness credibility, anything her clients can use to improve their presentation. Clients get the tapes, the transcripts, all questionnaires and the firm's report.

The real work begins after everyone leaves. They watch all the video and review all qualitative and quantitative data. The report takes weeks. It's an assessment of what worked and an in-depth analysis of the problem areas and suggested strategies and solutions to combat them.

Everything is strictly confidential. All of us understood the reason. Panelists are told their

videos aren't going to make them social media stars. To avoid "demand characteristics," unconscious leanings, no one let on which side of the case had hired us — though we could pretty well guess. The process was efficient and seamless from beginning to end. For us, that is.

Frustration by the lawyers and clients watching the deliberations and pulling their hair out is a sign of a successful mock arbitration.

"Hair on the floor is great," Geri said, "because when you've been living and breathing a case for years and years, you start to drink your own Kool-Aid or think an argument's really working when, in reality, it's not. We want to see hair on the floor. If we see all smiles and pats on the back we haven't done our job well."

While Geri has some scalability, nobody would go through all of this unless the stakes warrant it.

Sometimes she does more than one mock group after the report is turned in as a follow-up exercise. She has worked on most every sort of case but the mock arbitrations are usually commercial cases.

Here are her five reasons why lawyers should use mock arbitrations. First, for theming and narrative. Second, to inform settlement negotiations. Third, for demonstrative aid creation. Fourth to practice presentations, like a dress rehearsal, and fifth to understand the opposition's case.

I was super impressed by the lawyers' efforts to do everything possible to prepare for the arbitration. While not every case justifies the full treatment, lawyers going into arbitrations and bench trials might consider how they could use some of these ideas to prepare.